STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO THE
MAINE RULES OF CIVIL PROCEDURE

2008 Me. Rules 12

Effective: August 1, 2008

All of the Justices concurring therein, the following amendments to the Maine Rules of Civil Procedure, are hereby adopted to be effective August 1, 2008.

The specific rules amendments are set forth below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. Sub-paragraph (C) of Rule (7)(b)(1) of the Maine Rules of Civil Procedure adopted by 2008 Me. Rules 08, effective June 1, 2008, is further amended to read as follows:

> (C) A pre-judgment motion to decide a case on the merits, pursuant to Rule 12(b)(6), 12(c), or Rule 56, and a post-judgment motion for relief, to modify, to reconsider, to enforce by contempt, for a new trial, or for a stay, pursuant to Rules 59, 60(b), 62, 66, or 80(k) shall be accompanied by a fee set in the Court Fees Schedule which shall be paid when the motion is filed. A pre-judgment motion to decide a case based on res judicata or any defense that is addressed in Rule 12 (b) (1), (2), (3), (4), or (5), is not subject to payment of a fee.

Advisory Note – July 2008

This amendment adds Rule 12(c), addressing motions for judgment on the pleadings to those motions subject to a fee as addressed in sub-paragraph (C).

2. Rule 16(a)(1) of the Maine Rules of Civil Procedure is amended to read as follows:

(1) *Standard Scheduling Order.* Unless otherwise ordered by the court, after the filing of the answer in any civil action in the Superior Court other than proceedings pursuant to Rule 80, 80B or 80C, the court shall enter a standard scheduling order setting deadlines for a conference of counsel concerning discovery, the joinder of additional parties, the exchange of expert witness designations and reports, the scheduling and completion of an alternative dispute resolution conference when required by Rule 16B, the completion of discovery, the filing of motions, and the placement of the action on the trial list. The standard scheduling order shall not be modified except in accordance with Rule 16(a)(2) or on motion for good cause shown. The joinder of additional parties after the standard scheduling order has issued shall not require a modification of the scheduling order except on motion for good cause shown.

Advisory Committee Note – July 2008

Rule 16 is amended with corresponding amendments to Rules 26, 33, 34 and 37 to address the need for specific treatment of the discovery of electronically stored information. These amendments are taken largely from the 2006

amendments of the Federal Rules of Civil Procedure, which comprehensively address the discovery of electronically stored information. Guidance in the interpretation of the Maine rules may be obtained from the federal amendments, their Advisory Committee's Notes, and cases applying the federal rules. "Electronically stored information" is intended to have the same broad meaning found in Rule 34 (a), which permits discovery of electronically stored information regardless of the medium in which the information is stored or the method by which it is retrieved. Given the amount of information that exists only in electronic form, the discovery rules need to address the preservation and production of this information.

The fact that Rule 16 encourages the parties to address electronic information if a discovery conference is requested and that the discovery rules provide for the production of such information does not suggest that discovery of electronically stored information is appropriate in every case. As in every case, the parties are expected to engage in discovery in a reasonable manner. The court has broad powers at under Rules 26 and 37 to regulate discovery.

Rule 16(a)(1) is amended to require a scheduling order to include "a conference with counsel concerning discovery" early in the case. The form scheduling order recommended by the Advisory Committee requires a conference to be held "if requested by any party." The purpose of the conference with counsel concerning discovery is twofold. First, it is desirable for a counsel to discuss their plans for discovery early in the case. Frequently, such discussions can lead to narrowing the scope of discovery and setting the stage for more efficient use of resources in preparing the case. Second, cases now more frequently involve the production of electronically stored information. In those cases in which the discovery of electronically stored information is contemplated, it is important for counsel to discuss early in the case preservation of that information, which might otherwise be altered or deleted in the ordinary course of business, and to discuss the form in which such information can be preserved and produced. The intent of the rule is that this discussion take place early in the case to ensure that discovery proceeds efficiently and to require the parties to document an agreement concerning the preservation and production of information in order to prevent disputes later in the case.

The form scheduling order should be amended in part as follows:

SCHEDULING ORDER

Pursuant to M.R.Civ.P. 16(a), the court orders as follows:

1. Discovery Conference. If requested by any party, a conference of counsel shall be held to discuss a plan for discovery, including in appropriate cases a plan for the production and preservation of electronically stored information. Agreements by the parties, including an agreement that no such provisions need be made, shall not be filed with the court but shall be documented by written communication to all counsel. In the absence of agreement, disputes shall be resolved under Rule 26 (g).

[renumber remaining paragraphs accordingly]

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The draft scheduling order amendment submitted by the Advisory Committee with the amendment to Rule 16(a)(1) contains a new paragraph 1 to require a discovery conference "if requested by any party." The purpose of the conference is to encourage counsel "to discuss a plan for discovery, including in appropriate cases a plan for the production and preservation of electronically stored information." The parties may decide not to have such a conference. If the conference is requested and held, however, the parties may make agreements as to discovery generally and electronically stored information specifically or, alternatively, they may agree that no provisions need be made. In either case, the parties must document the agreements they reach in a written communication. That communication "shall not be filed with the court," but it must be in the form in which it can be presented to the court in the event that there is a dispute later in the case. The provision for a discovery conference is motivated by two considerations. First, the scheduling order encourages the parties to address the issue of discovery, including electronically stored information where appropriate, and to document what they have decided to do. It obviously would be simple to require such a conference, but the Advisory Committee believes that parties should be free to decide for themselves whether a conference need be held. Second, if the parties do address these issues and reach some agreement on how the issues are to be handled, it is the objective of this process to reduce the likelihood of disputes later in the case, including claims of spoliation of evidence. For example, if the parties agree that a particular type of information should be produced or preserved or agree that no such information need be preserved, those agreements as documented in the written communication required by the order should enable the court to address a spoliation claim in a more focused way than if no agreements were reached. In other jurisdictions, spoliation claims, particularly as to electronic

information, have resulted in substantial sanctions. Maine lawyers now have the tools to reduce that exposure. Similarly, the conference is a good opportunity for the parties to address whether electronically stored information is "reasonably accessible" within the meaning of Rule 26(b)(6).

Since the scheduling order is entered shortly after the answer is filed, the defendant may not have all of the information required to enter into definitive agreements on some of the discovery issues. In that case, the parties may agree -- and document their agreement -- to address these issues at a future time. If the parties are unable to agree on an issue during the discovery conference, the dispute "shall be resolved under Rule 26 (g)," as the proposed scheduling order requires.

Since the discovery schedule is relatively short, in cases in which a large volume of electronically stored information is produced, parties may find out later that information that is privileged or subject to the work product qualified immunity has been inadvertently produced. Proposed Rule 26(b)(5)(B) specifically addresses this issue and prescribes the procedure for handling the information once the claim of privilege is raised. In this context, and under amended Rule 26(b)(5)(B), the term "privilege" is intended to mean confidential information protected from discovery on any ground, whether by statutory provision, privilege created by law or rule, or otherwise.

3. Rule 26(b)(5) of the Maine Rules of Civil Procedure, as adopted by 2008 Me. Rules 04, is amended, and Rule 26(b)(6) of the Maine Rules of Civil Procedure is adopted, to read as follows:

(5) *Information Withheld under Claims of Privilege or Protection of Trial Preparation Materials; Inadvertent Production of Privileged or Trial Preparation Material*.

(A) **Claim of Privilege and Identification Required.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall

make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Inadvertent Production of Privileged or Trial Preparation Material. If information is inadvertently produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(6) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. On

application under Rule 26(g) to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or expense. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations and remedies of Rule 26(c). The court may specify conditions for the discovery and shall impose on the requesting party the reasonable expense of producing such electronically stored information .

Advisory Committee Note – July 2008

Rule 26(b)(5)(B) is adopted to govern the inadvertent production of privileged or trial preparation material. Subdivision (b)(6) is adopted to regulate the discovery of "electronically stored information" where the production of such information would cause undue burden and expense. The term "electronically stored information" as used now in the Maine Rules of Civil Procedure is intended to have the same broad meaning set forth in Rule 34(a), which permits discovery of electronically stored information regardless of the medium in which the information is stored or the method by which it is retrieved. These amendments are part of amendments to Rules 16, 26, 33, 34 and 37 to address the discovery of electronically stored information. The amendments are generally taken from the 2006 amendments to the Federal Rules of Civil Procedure governing electronic discovery. The Advisory Committee's Notes to the federal amendments are instructive and should guide the interpretation of the Maine amendments.

The amendment to Rule 26(b)(5)(B) recognizes that in discovery, especially in the production of a large volume of electronically stored information, privileged information or trial preparation material may inadvertently be produced. In this context, the term "privilege" includes material or information that is confidential and protected from disclosure in discovery, whether by statute, privilege or otherwise. Under the amendments, if a party has inadvertently produced documents or information that is subject to a claim of privilege or protection as

trial preparation material, the party making the claim must notify the receiving parties of the claim and the basis for it. After notification, the receiving party may not use or disclose the documents or information until the claim is resolved. The receiving party may, at its option, return, sequester or destroy the information, together with any copies it has made or disseminated. If the receiving party disputes the claim of privilege, the receiving party may properly present the information to the court under seal and request a determination of the claim under Rule 26 (g). Since information may have been delivered to expert witnesses or other persons involved in the case, the receiving party must also "take reasonable steps to retrieve" the information. Throughout this process and until the claim is determined, the producing party must preserve the information so that it is available to the court. These requirements are generally consistent with the Law Court's holding in *Corey v. Norman Hanson & DeTroy*, 1999 ME196, ¶ 19, 742 A.2d 933, 941, especially in its teaching that an inadvertent production does not, without more, automatically waive a privilege.

The intent of the amendment is to recognize that given tight discovery schedules and the volume of electronically stored or other information produced, a producing party may not have identified every document on which a claim of privilege may be appropriate. The amendment provides a procedure by which the producing party may notify other parties of a claim of privilege, stop the use of the information, and have the issue promptly determined. By its terms, the rule applies only where the production has been truly "inadvertent," and it is not intended to be used where information was knowingly produced and because of a change of tactics or circumstances, the privilege is belatedly asserted. Of course, the amendment to Rule 26(b)(5)(B) as a rule of procedure does not create any substantive law concerning privilege, trial preparation material or waiver of these protections.

Rule 26(b)(6) is also adopted to make clear that a party need not provide discovery of electronically stored information if that information is not "reasonably accessible because of undue burden or expense." The rule is taken from its federal counterpart, with an adaption to Maine practice by referring to Rule 26(c) and using the term "expense" in Rule 26(c) rather than "cost" in the federal rule. No substantive difference is intended. The new subdivision implements the commonsense principle that discovery is not unlimited.

If electronically stored information cannot be retrieved or translated into reasonably usable form without "undue burden or expense," the producing party must identify that fact to the requesting party. If an application is made to produce

the information under Rule 26(g), the party resisting discovery bears the initial burden to show the court that the information is not, in fact, "reasonably accessible because of undue burden or expense." The requesting party must then show "good cause" why the information should be produced notwithstanding the burden and expense. The court then considers whether the showings required by the rule have been made and it has broad discretion and remedial powers in addressing the issue. If the information can be reasonably produced, even if there is some burden or cost that is not "undue," production should simply be ordered as routine discovery. On the other hand, if the producing party meets its burden and the requesting party cannot show good cause for the production, no production is to be ordered. If the showings have been made, the court may still consider whether production should be required under the circumstances. If production is required, the court should consider, as Rule 26(c) contemplates, the extent of the production and what conditions the court may order to eliminate or mitigate "undue burden or expense." Assuming some "undue burden or expense" remains, however, the rule, unlike its federal counterpart, mandates that the requesting party pay the reasonable expense of that production.

4. Rule 33(c) of the Maine Rules of Civil Procedure is amended to read as follows:

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records<u>, including electronically stored information,</u> of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine,

audit or inspect such records and to make copies, compilations, abstracts or summaries.

Advisory Committee Note – July 2008

Rule 33 is amended to make clear that "business records" include "electronically stored information," which is intended to have the same broad meaning set forth in Rule 34 (a), which permits discovery of electronically stored information regardless of the medium in which the information is stored or the method by which it is retrieved. The amendment is made with simultaneous amendments to Rules 16, 26, 34 and 37 to provide a procedure for the discovery of electronically stored information. The amendments are taken largely from the 2006 amendments to the Federal Rules of Civil Procedure, whose Advisory Committees Notes and case law may be consulted for guidance.

5. Rule 34(a) and (b) of the Maine Rules of Civil Procedure is amended to read as follows:

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, <u>electronically stored information,</u> and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon

whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedures. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the

reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to produce or to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. If a request does not specify the form for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form that is reasonably usable. A party need not produce the same electronically stored information in more than one form.

Advisory Committee Note – July 2008

Rule 34 is amended to make explicit that discovery of "electronically stored information" is permitted. Discovery of electronically stored information is permitted regardless of the medium in which the information is stored or the method by which it is retrieved. The amendment is made with simultaneous amendments to Rules 16, 26, 34 and 37 to provide a procedure for the discovery of electronically stored information. The amendments are taken largely from the

2006 amendments to the Federal Rules of Civil Procedure, whose Advisory Committees Notes and case law may be consulted for guidance.

Under the amendment to subdivision (b), a request for production of electronically stored information may specify the form in which the requesting party desires the production of the information. Thus, under the amended rule, accounting records could be requested in printed form on paper or the requesting party could specify that the production of the records be made in electronic form in a commercial spreadsheet program format. If the producing party can reasonably produce the electronically stored information in the requested form, it must do so. At the same time, it is not the intent of the rule to impose undue burden or cost on the producing party. Consequently, the producing party may object to the requested form of production under the amendment to Rule 34 (b). If a dispute arises as to the form in which the information should be produced, or if the producing party claims that it would constitute an "undue burden or cost" to produce the information at all (see Rule 26 (b)(6)), the dispute must be resolved under Rule 26 (g).

If no particular form is specified in the request, electronically stored information may be produced in the form in which it is ordinarily maintained or in any form "that is reasonably usable." As the amendment to Rule 34(b) states, a party need not produce the same electronically stored information in more than one form.

6. Rule 37(f) of the Maine Rules of Civil Procedure is adopted to read as follows:

(f) Electronically Stored Information. Absent exceptional circumstances, the court shall not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Advisory Committee Note – July 2008

Rule 37 (f) is amended to address the discovery of electronically stored information. Corresponding amendments have also been made to Rules 16, 26, 33, and 34. The amendment to Rule 37 (f) is intended to protect parties who may have lost electronically stored information "as a result of the routine, good-faith operation of an electronic information system." The amendment is identical to the 2006 amendment to F.R.Civ.P. 37 (e), whose Advisory Committee's Notes and case law should be consulted for guidance.

The amendment to Rule 37(f) is in effort to balance two interests. First, a party should not be sanctioned or subject to a claim of spoliation of evidence if electronically stored information is lost or altered as a result of the good-faith operation of the party's electronic information system. The amendment recognizes that electronic information is dynamic, subject to routine alteration or deletion, and may not always be available in the same form as when the events giving rise to the case took place. Second, the rule also recognizes that the dynamic nature of electronically stored information is not a license to create or maintain an environment in which relevant evidence is rendered unavailable. The rule seeks to balance these interests by requiring that the protection of the rule extends only to the operation of an electronic information system that is both "routine" and "good faith."

Obviously, the requirement that the operation of the information system be "routine" requires that the operation be in the ordinary course of business. At the same time, "good faith" may require an intervention to ensure that information is not lost. As the federal Advisory Committee Note makes clear, "[G]ood faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37 (f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations while allowing that operation to continue in order to destroy specific stored information that it is required to preserve." One of the sources of such a requirement may be a "litigation hold" order or agreement that might be created in the discovery conference process under Rule 16 (a). A party receiving a litigation hold request before or during suit would be well advised to take reasonable steps to protect the information pending a ruling from the court.

Although the amendment to Rule 37 (f) provides that a party will not be sanctioned under the circumstances the rule contemplates, if a party is found to have rendered electronically stored information unavailable by means not the result

of the "routine, good faith operation in an electronic information system," the court has broad powers to make appropriate orders and to sanction the offending party.

7. Rule 89, subdivision (c), the initial paragraph and paragraphs (1) and (3) of the Maine Rules of Civil Procedure are amended to read as follows:

(c) Attorneys Practicing With Legal Services Organizations. Any member in good standing of the Bar of any other state or of the District of Columbia who becomes employed ~~on a full-time basis~~ by a legal services organization based in this State that is funded from state, federal or recognized charitable sources and provides legal assistance to indigents in civil matters, may be permitted to practice before the courts of this State subject to the provisions of this Rule. Attorneys permitted to practice under this Rule are not, and shall not represent themselves to be, members of the bar of this State, and shall not practice law in Maine outside of the scope of the attorney's employment with a legal services organization based in Maine. Practice under this Rule shall be subject to the following conditions:

(1) An application for temporary permission to practice law in this State under the provisions of this Rule shall be filed with the Clerk of the Law Court, and shall be accompanied by:

(A) a certificate of the highest court of another state certifying that the attorney is a member in good standing in the bar of that court; and

(B) a statement signed by the executive director or chief executive officer of the legal services organization that the attorney (i) is currently employed ~~on a full-time basis~~ by the organization, and (ii) has expressly agreed not to practice law in Maine outside of the scope of the attorney's employment with the legal services organization. ~~"Employed on a full time basis" shall mean employment performing services for the employer or clients of the employer for at least 35 hours in an average work week.~~

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(3) Permission to practice under this Rule shall terminate whenever the attorney ceases to be employed ~~on a full-time basis~~ by the legal services organization. When an attorney permitted to practice under this Rule ceases to be so employed, the attorney shall file a statement to that effect with the Clerk of the Law Court and the Board of Overseers of the Bar.

Advisory Note – July 2008

This amendment removes the "full time" employment restriction from Rule 89(c). It would allow any attorney employed by a legal services organization as defined in the Rule to be admitted to practice, representing only the legal services organization and its clients, for a period of up to two years without being admitted to the Maine Bar. The two year restriction and a requirement that any application be approved by a single justice of the Supreme Judicial Court are stated in paragraph 2 of the current Rule 89(c). The temporary permission to practice is subject to the other terms and conditions specified in the Rule.

8. These amendments shall be effective August 1, 2008.

Dated: July 7, 2008

/s/
LEIGH I. SAUFLEY
Chief Justice

/s/
ROBERT W. CLIFFORD
Associate Justice

/s/
DONALD G. ALEXANDER
Associate Justice

/s/
JON D. LEVY
Associate Justice

/s/
WARREN M. SILVER
Associate Justice

/s/
ANDREW M. MEAD
Associate Justice

/s/
ELLEN A. GORMAN
Associate Justice